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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

MADISON HARBOR, ALC, Plaintiff and Respondent, v. TU MY TONG, Defendant and Appellant.	G039798 (Super. Ct. No. 06CC07137) O P I N I O N

Appeal from a judgment and postjudgment order of the Superior Court of Orange County, Jane D. Myers, Temporary Judge. (Pursuant to Cal. Const., art. VI § 21.) Appeal from judgment dismissed. Postjudgment order affirmed.

Madison Harbor, Robert Sabahat and MacKenzie T. Batzer for Plaintiff and Respondent.

Tu My Tong, in pro. per.; Fredman Lieberman, Marc A. Lieberman, and Alan W. Forsley for Defendant and Appellant.

* * *

Plaintiff Madison Harbor, ALC, obtained a default judgment against its former client, defendant Tu My Tong. Following entry of the default judgment, defendant moved to set aside the default and default judgment under Code of Civil Procedure section 473, subdivision (b) (section 473(b)),[1] "on the ground that the Default Judgment was taken as a result of Defendant's mistaken belief that a Summons had not been served in the action." The court denied this motion as untimely, and defendant appealed the court's denial of her motion and the underlying default judgment. We affirm the court's postjudgment order, as defendant moved for relief more than six months after default was entered. (§ 473(b).) Moreover, we dismiss defendant's appeal of the underlying default judgment as untimely under California Rules of Court, rule 8.104(a).

FACTS

On June 15, 2006, plaintiff filed a complaint which alleged the following against defendant: the parties entered into a written fee agreement for provision of legal services by plaintiff; plaintiff provided such legal services following the execution of the agreement; and defendant failed to pay for the services in the amount of $30,295. Plaintiff attached to the complaint the fee agreement and copies of billing statements.

Defendant did not file an answer, demurrer, or any other responsive pleading. On March 1, 2007, the clerk of the court entered defendant's default. Following the submission of an evidentiary declaration by plaintiff, the court entered judgment by default on June 27, 2007, in the amount of $44,913, including $41,895 in

[1] All statutory references are to the Code of Civil Procedure.

compensatory damages. The court accepted plaintiff's representation of the damages at issue in the declaration plaintiff submitted.

On November 26, 2007, defendant noticed a motion (to be heard December 20, 2007) to set aside default and default judgment. Defendant's notice of motion indicated the motion was made under section 473(b), "on the ground that the Default Judgment was taken as a result of Defendant's mistaken belief that a Summons had not been served in the action." Along with a two-page memorandum of points and authorities, defendant submitted a declaration in which she testified to the following: "I was out of the country in Viet Nam on October 12, 2006, and never received a copy of the Summons and Complaint and had no knowledge or information that a Summons and Complaint had been served." "In September 2007, as a result of a routine check of court records, I became aware for the first time of [this] case . . . ." The memorandum of points and authorities added no additional authorities or relevant facts to those provided in the notice of motion and declaration.[2]

On December 20, 2007, the court denied defendant's motion because it was filed more than six months after entry of default. At the hearing, defendant (representing herself) attempted to focus the court's attention on an allegation that the summons was served at the wrong address. The record is not clear, but it appears she was attempting to

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[2] Defendant's only other reference to authority in her papers besides section 473(b), was an inaccurate citation to *Riskin v. Towers* (1944) 24 Cal.2d 274 (*Riskin*). Defendant misspelled the party name (Rifkin rather than Riskin) and transposed the reporter volume (42 rather than 24). If the trial court was able to unravel this error, *Riskin* indeed provided some support for plaintiff's motion, as it involved a defendant who was entitled to relief under section 473 due to his mistaken belief that he had not properly been served with the summons. However, in *Riskin*, the defendant had promptly moved to quash service of summons and the default entry; after that motion was unsuccessful (i.e., the court found he had been properly served), defendant then promptly moved for relief under section 473. (*Id*. at pp. 275-279.) Here, of course, there had been no antecedent motion attacking the service of summons and, as demonstrated below, defendant did not timely file the section 473(b) motion.

make a different argument (i.e., valid service of summons never occurred) from the one made in her moving papers (i.e., she should be excused from default due to her mistaken understanding of the validity of service of summons). Interestingly, the court informed defendant that she "probably [has] another remedy, but you'll have to talk to an attorney about that."

An examination of the proof of service of summons and other documents pertaining to service on defendant reveals a series of inconsistencies. A proof of service of summons filed on December 14, 2006 indicates a registered California process server served defendant by substitute service, leaving the summons and the complaint with a "JOHN DOE CAUCASIAN MALE" at "504 WEST 41ST DRIVE # 306A" in Los Angeles, and thereafter mailing a copy of the summons and complaint to the "place where the copies were left." The unit number (306A) was written into the document over a typed number. Inexplicably, the same document was filed with the court on February 22, 2007, this time without the unit number "306A" written in the document; instead, the original unit number, "101," was still visible. Plaintiff also filed a declaration of due diligence by the process server, which indicates he attempted to serve defendant on four separate occasions at unit number 101. In addition, plaintiff's request for entry of default and court judgment includes a declaration of mailing pursuant to section 587. This document indicates plaintiff mailed a copy of the request for default to defendant at unit 104 and unit 101 (but there is no indication a copy was mailed to unit 306A). Papers filed by defendant in the trial court and on appeal indicate her unit number is 306.

Plaintiff, in its opposition brief to defendant's motion and in its opposition brief here, points to defendant's personal appearance at a December 2006 case management conference as proof defendant had notice of the action and in fact made a general appearance. The court noted at the hearing of defendant's motion that defendant appeared in the case prior to the court's entry of default: "Our file reflects that you

[defendant] actually made an appearance in this matter on December 8, 2006. You were present in this department."

DISCUSSION

Defendant claims the court erred in four ways: (1) ruling the time to bring a motion to set aside the default under section 473(b) had expired; (2) failing to consider whether defendant's motion was timely under section 473.5; (3) entering a default judgment for a greater amount than that demanded in the complaint; and (4) entering default in spite of plaintiff's service of the default papers on the wrong address.

Before addressing these issues, we first determine whether defendant's appeal is timely. California Rules of Court, rule 8.104, prescribes a deadline to appeal of either 60 days after service of notice of entry of judgment or, if no such notice of entry is served, 180 days after entry of judgment. Here, judgment was entered on June 27, 2007. Plaintiff does not contend in its brief that defendant was served with notice of entry of judgment (by either itself or the court), and the record does not include a document establishing service of notice of entry of judgment on defendant. Thus, defendant had 180 days from June 27, 2007 to appeal the default judgment.

With regard to the section 473(b) motion, the court entered its minute order denying the motion on December 20, 2007. The record does not include a notice of entry of the postjudgment order; even if such notice had been provided, defendant would have had at least 60 days after December 20, 2007 to appeal the order.

On January 15, 2008, defendant filed a notice of appeal of the default judgment and the court's order denying her motion to set aside default and default judgment. Defendant's notice of appeal was filed less than a month after entry of the court's order denying relief under section 473(b). Thus, we may review this postjudgment order. (Cal. Rules of Court, rule 8.104(a); § 904.1, subd. (a)(2); *Sporn v.*

Home Depot USA, Inc. (2005) 126 Cal.App.4th 1294, 1299.) Defendant's appeal of the default judgment, however, was untimely, as it came more than 180 days after entry of judgment. We lack jurisdiction to review the default judgment itself.

Section 473(b) Motion

Defendant filed a motion under section 473(b) seeking discretionary relief from the entry of default based on her own (not her attorney's) mistake, inadvertence, surprise, or excusable neglect. Section 473(b) states in relevant part: "The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect. Application for this relief . . . shall be made within a reasonable time, *in no case exceeding six months*, after the judgment, dismissal, order, or proceeding was taken." (Italics added.)

Plaintiff's argument in her motion to the trial court was that her default should be excused due to her mistaken understanding that she had not been served with a copy of the summons. A motion for section 473(b) "discretionary relief must be filed within 6 months after the clerk's entry of default. The motion is ineffective if filed thereafter, even if it is within 6 months after entry of the default *judgment* . . . ." (Weil and Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2008) ¶ 5:279, p. 5-67.) "The reason for the rule is that vacation of the judgment alone ordinarily would constitute an idle act; if the judgment were vacated the default would remain intact and permit immediate entry of another judgment giving the plaintiff the relief to which his complaint entitles him." (*Rutan v. Summit Sports, Inc.* (1985) 173 Cal.App.3d 965, 970; see also *Nemeth v. Trumbull* (1963) 220 Cal.App.2d 788, 791-792.) Here, the court rejected defendant's motion because it was untimely with regard to the default. Default was entered on March 1, 2007, more than six months prior to

defendant's filing of her motion on November 26, 2007. This ruling was appropriate based on the arguments raised by defendant in her motion.

Defendant's factual and legal positions are muddled due to the meager record developed at the trial court and due to somewhat contradictory positions taken by defendant in her various trial court and appellate submissions. Defendant argues on appeal that her real argument was she was never served with a copy of the summons and complaint. She cites *Rogers v. Silverman* (1989) 216 Cal.App.3d 1114, 1126, as standing for the proposition that "the time in which to file a motion to vacate a default judgment valid on its face but void due to improper service commences upon the entry of judgment." This was not the issue presented to the trial court; the court correctly ruled on the motion put before it by defendant.

We agree with defendant that the question of whether she was ever served with a summons in this case remains unclear.[3] Under section 473, subdivision (d), the court may set aside a default judgment which is valid on its face, but void as a matter of law due to improper service. (*Ellard v. Conway* (2001) 94 Cal.App.4th 540, 544.) We agree with plaintiff, however, that the court never reached this issue because defendant never raised it. We will not attempt to discuss the merit of claims defendant has not yet made to the trial court.

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[3] Plaintiff appears to argue in its brief that any proof of service inconsistencies amount to "typographical error[s]" that could have been easily explained in a declaration at the trial level had defendant raised the issues there. Perhaps, but it would be an odd series of typographical errors if plaintiff typed the wrong unit number in three forms submitted to the court (the second proof of service of summons, the declaration of due diligence in serving the summons, and the section 587 declaration of mailing the default papers), yet put the correct unit number on the address label used to mail the documents to defendant. On the other hand, defendant's appearance at the case management conference does not help her case, regardless of her theory for relief.

Section 473.5 Motion

Section 473.5, subdivision (a), states in relevant part: "When service of a summons has not resulted in actual notice to a party in time to defend the action and a default or default judgment has been entered against him or her in the action, he or she may serve and file a notice of motion to set aside the default or default judgment and for leave to defend the action. The notice of motion shall be served and filed within a reasonable time, but in no event exceeding the earlier of: (i) two years after entry of a default judgment against him or her; or (ii) 180 days after service on him or her of a written notice that the default or default judgment has been entered."

Here, defendant never filed a motion invoking the authority of section 473.5. There simply is no order for us to review. The court was not afforded the opportunity to weigh the facts and the record to decide whether it was authorized to provide relief under section 473.5 and, if so, whether it would exercise its discretion to set aside the default or default judgment. (See § 473.5, subd. (c).)

We express no opinion as to the merits of a section 473.5 motion in this case and whether such a motion would be timely if brought at this time in the trial court. The record before us does not indicate whether defendant was served with written notice of entry of default or with written notice of entry of the default judgment.

Default Judgment Damages

Section 580, subdivision (a), provides: "The relief granted to the plaintiff, if there is no answer, cannot exceed that [1] demanded in [2] the complaint . . . ." "The primary purpose of this section is to insure that defendants in cases which involve a default judgment have adequate notice of the judgments that may be taken against them." (*Becker v. S.P.V. Construction Co.* (1980) 27 Cal.3d 489, 493.) "'If a judgment other than that which is demanded is taken against him, [the defendant] has been deprived of his day in court — a right to a hearing on the matter adjudicated.'" (*Ibid*.)

It is clear on the face of the judgment that the compensatory damages entered by the court ($41,895) exceed the amount alleged in the complaint ($30,295). As currently constituted, it appears the default judgment was beyond the jurisdiction of the court and therefore void. (*In re Marriage of Lippel* (1990) 51 Cal.3d 1160, 1167; *Electronic Funds Solutions, LLC v. Murphy* (2005) 134 Cal.App.4th 1161, 1173-1174.)

Defendant did not raise the issue of an excessive judgment below in her motion to set aside the judgment. (See *Julius Schifaugh IV Consulting Services, Inc. v. Avaris Capital, Inc.* (2008) 164 Cal.App.4th 1393, 1396 ["When a default judgment in excess of the amount demanded in the complaint has been entered, the defendant generally may challenge the judgment by (1) filing in the trial court a motion to vacate the judgment or a motion for new trial; or (2) appealing from the judgment"].) Thus, the issue is not properly before us. We lack jurisdiction of defendant's appeal of the default judgment and there is no court order denying relief from a void judgment under section 473, subdivision (d).

We note that despite her tardy appeal of the judgment, defendant may still have a remedy. A void judgment may be challenged by motion to the trial court beyond the six-month limitation set by section 473(b). (See *Plotitsa v. Superior Court* (1983) 140 Cal.App.3d 755, 761.) Defendant is also entitled to challenge a void judgment in a collateral action.[4]

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[4] We disagree with plaintiff's position that this argument has been "forfeited." Had defendant filed a timely appeal from the default judgment itself, we could have reviewed the judgment despite the fact defendant did not raise the issue of excessive damages below. It must be recalled that a defendant cannot appear at a default judgment "prove-up" hearing — once default is entered, a defendant no longer has a right to appear in the action other than to move to set aside the default or to appeal the judgment. (*Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.* (1984) 155 Cal.App.3d 381, 385-386.) It would be an absurdity to apply the forfeiture doctrine to the issue of whether a default judgment is void for excessive damages.

Service of Request for Default

Finally, defendant argues the court erred when it entered default even though defendant allegedly provided improper service of the request for entry of default. Section 587 states in relevant part: "An application by a plaintiff for entry of default . . . shall include an affidavit stating that a copy of the application has been mailed to the defendant's attorney of record or, if none, to the defendant at his or her last known address and the date on which the copy was mailed. . . . [¶] No default . . . shall be entered, unless the affidavit is filed. The nonreceipt of the notice shall not invalidate or constitute ground for setting aside any judgment." In filing its request for default (on a mandatory judicial council form), plaintiff included a section 587 declaration in which its representative attested that copies of the request for entry of default were mailed to "defendant's last known address" at "504 West 41st Drive, #104" and "504 West 41st Drive, #101."

Defendant argues in her appeal that service was not completed at the proper address, unit number 306. Defendant requests that this court "set aside" the default judgment "because [plaintiff] did not send the Request for Entry of Default to Appellant at the same address where the Summons and Complaint were allegedly served." Plaintiff responds that defendant did not raise this issue below. Also, plaintiff claims it did comply with section 587 by submitting a declaration of service and "'the nonreceipt of the notice shall not invalidate or constitute ground for setting aside any judgment.'" (§ 587.)

Defendant cites *Slusher v. Durrer* (1977) 69 Cal.App.3d 747, 755 for the proposition that "[i]nherent in the provisions of section 587 . . . is a duty on the part of plaintiff and counsel to make a reasonably diligent search to ascertain [the last known] mailing address." We do not disagree with this statement of the law. Nor do we disagree with the holding in *Slusher v. Durrer*, which was to affirm the trial court's order vacating a default and default judgment upon a motion by the defendant based on his excusable

mistake in thinking the civil case at issue was resolved (he misinterpreted comments at a criminal hearing relating to the same incident). (*Id*. at pp. 753-755.)

Defendant, however, did not support her request for relief from the trial court with an argument that plaintiff failed to comply with section 587. As already stated, we cannot allow defendant to raise entirely new arguments to this court that were not first made to the trial court in defendant's motion for discretionary relief from the default and default judgment. And, as shown above, we do not have jurisdiction to review the default judgment itself, as defendant filed her notice of appeal more than 180 days after the court entered default judgment. There is nothing we can review with regard to the issue of plaintiff's allegedly faulty section 587 declaration. Even if this issue were properly before us, it is doubtful plaintiff's allegedly improper section 587 declaration would, on its own, provide grounds for vacating the default and default judgment. (§ 587 ["the nonreceipt of the notice shall not invalidate or constitute ground for setting aside any judgment"]; *Taylor v. Varga* (1995) 37 Cal.App.4th 750, 759-760 [non-prejudicial errors in section 587 declaration not grounds to vacate default]; *Jackson v. Bank of America* (1983) 141 Cal.App.3d 55, 58-59 [no merit in argument that incomplete address on section 587 declaration constituted ground for vacating default]; *Slusher v. Durrer*, *supra*, 69 Cal.App.3d at pp. 753-756 [discussion of plaintiff's failure to diligently pursue service of request for default on defendant is extraneous to court's holding affirming order].)

DISPOSITION

The court's postjudgment order denying defendant relief on her motion to set aside the entry of default and default judgment is affirmed. Defendant's appeal of the default judgment is dismissed as untimely. We deny plaintiff's request for judicial notice

as irrelevant to the issues before us. (See *Gbur v. Cohen* (1979) 93 Cal.App.3d 296, 301.)

IKOLA, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

O'LEARY, J.